

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action
	)	No. 13-10200-GAO
	)	
DZHOKHAR A. TSARNAEV, also	)	
known as Jahar Tsarni,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.  
UNITED STATES DISTRICT JUDGE

**LOBBY CONFERENCE - SEALED**

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts 02210  
Friday, December 26, 2014  
11:03 a.m.

Marcia G. Patrisso, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
One Courthouse Way, Room 3510  
Boston, Massachusetts 02210  
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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14 On Behalf of the Government

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P R O C E E D I N G S

THE COURT: So we have scheduled on Tuesday a further conference about juror questionnaires so I'm not going to get into any of that. This is really focused on the list issue for now. But except one -- there's always an exception, right? On the motion to continue, I've forgotten whether it's a motion or you were seeking to file a reply to the government's --

MS. CLARKE: Yes.

THE COURT: Could we have that by the end of the day on Monday so we could address it Tuesday?

MS. CLARKE: Sure.

THE COURT: Okay.

MS. CONRAD: Is there a time for Tuesday? I'm not sure I'd seen that.

MS. CLARKE: Yes, you said it when we were in there.

MR. WEINREB: 10:30.

THE COURT: 10:30. And we'll probably do it here as well. It will not be on the calendar because it will be in camera.

Okay. So it appears that the controversy over the lists has narrowed, if not evaporated?

MS. CLARKE: It sounds like --

THE COURT: That the law enforcement personnel can be identified by their agency --

MS. CLARKE: Yes.

1 THE COURT: -- and not their home address?

2 That the other witnesses will be  
3 addressed -- witnesses, non-law enforcement, will be identified  
4 by home address --

5 MR. WEINREB: Yes, your Honor.

6 THE COURT: -- under the sensitive category of the  
7 protective order, and that the veniremen will be identified  
8 with home address. And when we say "veniremen," I don't know  
9 that this was ever a controversy. We're talking about the  
10 1,200, roughly, not the original 3,000, some of whom have  
11 been disqualified and various things we're talking about.

12 MS. CLARKE: That's the position we have taken, the  
13 1,200 --

14 THE COURT: Yeah, I think that's sensible as well.

15 MS. CLARKE: There is one matter in controversy that  
16 remains, and that is the government's instructions to its  
17 witnesses with regard to the defendant requesting their  
18 addresses as opposed to the statute requiring the production.  
19 We took -- we feel like that's an incorrect interpretation of  
20 the statute and causes some inflammatory -- potentially  
21 inflammatory use by the witnesses towards us, and if it gets  
22 out to the press, it will be played as "terror suspect seeks to  
23 visit witnesses in their living room" or something like that.

24 THE COURT: Yeah, all right. I understand -- from the  
25 papers I understand the controversy.

1           Tell me what -- why it's necessary to communicate with  
2           the witnesses, to produce a list of the witnesses.

3           MR. WEINREB: Well, your Honor, it's our position both  
4           under the -- as we see the Victim Rights Act which requires us  
5           to protect the witnesses' privacy, but even beyond that, simply  
6           our role in assisting the witnesses to notify them that we're  
7           providing their home addresses to the defense in the event that  
8           they find out that the home addresses have been provided to the  
9           defense which they could -- if defense investigators come  
10          knocking on their door, they may ask us, "How did these people  
11          have my home address?" And it's very important to us that we  
12          maintain their confidence because we both by statute and by  
13          custom provide them with all sorts of assistance and guidance  
14          with respect to the trial proceedings, and they need to be  
15          confident that we're dealing straight up with them and --

16          THE COURT: There may be two categories of witnesses,  
17          though: victims who will be witnesses and non-victims who are  
18          not law enforcement. So I understand the victims -- well, I  
19          understand the possibility, anyway, that because of the victims  
20          rights' statutes, witnesses who are also victims and meet the  
21          definition might have to have some special consideration, but  
22          that would not apply to non-victim witnesses.

23          MR. WEINREB: That's correct.

24          THE COURT: All right. So is there any need to give  
25          them an explanation, the non-victim civilian witnesses? And I

1 guess the second part of the question is: Why can't you just  
2 blame me?

3 MR. WEINREB: Well, your Honor, it's really -- it's a  
4 little unclear to us really what relief the defense is seeking  
5 here in the sense that what -- what an order might even say  
6 because we have conversations with the witnesses -- the  
7 victims in all kinds of ways. They call us on the phone, they  
8 send us emails, they talk to victim witness experts at the U.S.  
9 Attorney's Office and the FBI. And it's virtually impossible  
10 to dictate word for word what each conversation is going to  
11 sound like.

12 So, you know, if they say -- if a victim witness were  
13 to ask -- even if we were to say, you know, "The judge has  
14 ordered that all your addresses be given to the defense," we  
15 might very well begin to get phone calls and letters saying,  
16 "Why? Why did he order that?"

17 THE COURT: Because there's a statute.

18 MR. WEINREB: There's a statute that says he must.  
19 "And what's the defense going to do with that?" "Why did they  
20 want it?" "Did you oppose it?" "Did they have to ask" -- I  
21 mean, we get all sorts of -- they're very curious. We get all  
22 sorts of questions about this and I think there's no -- unless  
23 we were to say there's a gag order on it so we can't discuss  
24 the matters at all, which that I think we'd really like not to  
25 do because I think that would alarm them, I think it's not

1 practical to craft an order governing precisely what we have to  
2 say about it.

3 MS. CLARKE: Well, the truth of the matter is it's not  
4 being given at the defendant's request. The truth of the  
5 matter is that the statute says "shall," and to take the  
6 position that the defendant has to affirmatively waive is  
7 pretty absurd, actually. It's sort of like saying you have the  
8 right to a jury trial but you could waive it and telling the  
9 public that the defendant could waive his right to a jury  
10 trial. It's a little bit absurd. The statute requires the  
11 government to produce this information, period. If the  
12 government violated the statute and the defendant didn't  
13 object, I think that's when the courts find a waiver, but the  
14 statute requires it.

15 Now, if the government wanted to violate the statute  
16 and then see if the defendant requests it, I guess that's a  
17 different thing. But the Court raised it on Friday -- or  
18 Thursday after the status conference when we came in here in  
19 camera. The Court raised the question. And the government  
20 knows its obligation and it attaches because it's a capital  
21 prosecution.

22 THE COURT: Yeah. I mean, I think in everyday  
23 language speaking to non-lawyers whether something is mandatory  
24 and waivable and waived and so on and so forth gets a little  
25 bit, perhaps, more precise than practically speaking it should

1 be understood. I mean, it is -- I mean, a defendant can insist  
2 on a jury trial by refusing to waive it, you know, can insist  
3 on the production of home information by refusing to waive it.  
4 So it's not as simple as you say, but let's just -- I think  
5 going forward you should explain to the witnesses that the  
6 statute requires it and that under the circumstances I have  
7 required that compliance. If they -- we can't regulate every  
8 conversation you have with them but I think it's fair to say  
9 that it's statutory and it's being supervised by the Court or  
10 whatever, okay?

11 Practically speaking, this is going to be able to be  
12 done by the end of the day by Monday?

13 MR. WEINREB: Providing the addresses?

14 THE COURT: The names and addresses.

15 MR. WEINREB: Yes, your Honor.

16 THE COURT: Now, with respect to the law enforcement  
17 people, the list is pretty general. I assume you can confirm  
18 whether this is true, that if the defense wanted to talk to a  
19 particular FBI agent on the list, or at least tried to talk to  
20 them, you could help them find where that person was?

21 MR. WEINREB: Yes.

22 THE COURT: The only thought I had further was if you  
23 might identify the office where they work, Boston FBI,  
24 Washington FBI, whatever.

25 MS. CLARKE: I thought you were going to offer --



1 THE COURT: But as a practical matter, if they want to  
2 find --

3 MS. CLARKE: I thought the government's position was  
4 that it would be work addresses.

5 THE COURT: Yeah. But at least you know which  
6 telephone number to call.

7 MS. CLARKE: Right.

8 THE COURT: So John Abruzzese, FBI, number one on the  
9 list, you could say "Boston regional office."

10 MR. WEINREB: Yes. What we argued in our papers was  
11 agency affiliation, not work address, per se, but we're willing  
12 to add to that, which field office they're assigned to.

13 THE COURT: Yeah, that was my point.

14 MR. WEINREB: Sure.

15 MS. CLARKE: Right. I mean, I guess it would be a  
16 question if we needed to issue a subpoena, we would know where  
17 to do that.

18 THE COURT: I'm sure they'll --

19 MR. WEINREB: If the defense wants to subpoena any FBI  
20 witness, they can just let us know and we'll make them  
21 available.

22 THE COURT: Without a subpoena?

23 MR. WEINREB: Without a subpoena. Yes, we will.

24 MS. CONRAD: With respect to the emails that went out,  
25 Judge, we had asked the government to give us a list of the

1 name of the witnesses who received the emails and the  
2 government declined. And I would press that request, the email  
3 saying that it was the defendant's request that they were  
4 required to provide their addresses.

5 THE COURT: No, I think we'll leave it as it is. I  
6 don't want this to be a continual -- we have enough things to  
7 fight about.

8 MR. WEINREB: Your Honor, we have two entirely  
9 unrelated things we just wanted to take this opportunity to  
10 raise, if we could. One is the question of the screen in the  
11 courtroom. I don't know if you personally have been involved  
12 in these discussions --

13 THE COURT: A little bit.

14 MR. WEINREB: Okay. So we --

15 THE COURT: I haven't talked to the IT people; I've  
16 talked to the clerk's office personnel who have talked to the  
17 IT people.

18 MR. WEINREB: I'll explain it to you from our  
19 perspective, or our understanding of what the issues are which  
20 might be slightly imperfect, which is we have quite a number of  
21 exhibits that are visual and we have them in digital format,  
22 and by far the best way to view them for the jury would be if  
23 they were projected digitally; in other words, if the bus that  
24 carried the signal from the computer to the screen maintained  
25 the digital signal. If you convert it to an analog signal, it

1 gets degraded, and then if you convert it even further to the  
2 little screens that the jurors have in front of them as opposed  
3 to a big screen, it can be impossible to see things that are on  
4 there that would be useful for the jury to see, in our view.

5 So our main desire would be to be able to use a  
6 digital projection screen in the courtroom. We have one which  
7 we've notified the court staff we have. It's essentially a  
8 white board. And I think that the IT people had a concern that  
9 because there would be a direct digital connection from the  
10 computer to the screen, it would not be filtered through the  
11 devices that the Court can use to shut things off, so we would  
12 have to not turn on the screen unless the Court said it was  
13 okay.

14 So we just wanted to -- if that wasn't your  
15 understanding, we just wanted to let you know that was our  
16 understanding of what the issue is. But barring the  
17 whiteboard, at the very least we would like to have one of the  
18 large projection screens that are usually turned towards the  
19 audience available for the jury to see, and our understanding  
20 is there will be two in the courtroom.

21 THE COURT: That might be more feasible. I don't  
22 know. I'll have to explore that.

23 Have you been party to this at all?

24 MS. CLARKE: No.

25 THE COURT: So I don't know the technical aspects and

1 I don't know what the degree of degradation is and so on and so  
2 forth. Normally, you know, you work with government equipment,  
3 you get what the government provides.

4 MS. CLARKE: I think we're talking about the video,  
5 the Boylston Street video. Is that the one?

6 MS. PELLEGRINI: There are a number of them.

7 MR. WEINREB: There are a number of photographs as  
8 well.

9 THE COURT: These are not things that come from the  
10 defendant's computer?

11 MR. WEINREB: No.

12 THE COURT: Those would be different?

13 MR. WEINREB: Those would be different. These are  
14 surveillance videos, photographs that were taken by people, by  
15 law enforcement.

16 THE COURT: In their original format they were  
17 digital?

18 MR. WEINREB: Yes. Virtually all of them, they're all  
19 digital.

20 THE COURT: Because they're cell phones?

21 MR. WEINREB: Cell phones, digital cameras.

22 MR. CHAKRAVARTY: Some were emailed.

23 MR. WEINREB: Digital cameras, recorders.

24 THE COURT: I haven't gotten into it in detail with  
25 the IT people. We did arrange to have a second gallery screen

1 provided because people on that side of the courtroom can't see  
2 the other one, so we just thought it was for the gallery,  
3 basically. I suppose it may be possible as necessary to just  
4 flip that around. It crosses that side of the courtroom, the  
5 ability to see it.

6 MR. CHAKRAVARTY: Or if it's possible to get a third,  
7 they would be back to back.

8 THE COURT: We can look into that. My impression was  
9 the space was pretty limited, and that may be --

10 MS. PELLEGRINI: It is limited, your Honor; however,  
11 I've been in there when they've played it, and just trying to  
12 see and going around from screen to screen. So the irony is  
13 that the gallery gets a great view because those monitors --  
14 the monitor that's in there now is very much like this, nice  
15 and sharp. And then sitting in the jury box, the screens are  
16 kind of dark, people do have to share, so you have to tilt your  
17 head a little bit sometimes.

18 So we were thinking, I think there is room for the  
19 smart board monitor to back up to the gallery monitor. It's  
20 tight, but it's doable.

21 THE COURT: The other issue is being outside the  
22 control system, so one of the features of the system is that I  
23 control who sees what. It's not just that I control it, but  
24 that I have different options. So that in doing --

25 MS. CLARKE: As to who sees it.

1           THE COURT: That's right. And if you do it -- if you  
2 have to lay a foundation for an exhibit, for example, you can  
3 show it only to the witness and that, of course, excludes the  
4 jury. You can show it only to me so that the witness doesn't  
5 see it. And so there are all those possibilities which will  
6 probably be lost. It will be binary then; everybody sees it or  
7 nobody sees it.

8           MR. WEINREB: No. No.

9           THE COURT: Would it still work through the system?

10          MR. WEINREB: No, this would just act as an additional  
11 monitor, so basically it would just mean that the Court  
12 couldn't control this monitor, everything else --

13          THE COURT: That's what I mean. I couldn't show it.

14          MR. WEINREB: So the monitor would, by default, be  
15 off.

16          THE COURT: Right.

17          MR. WEINREB: And it would be turned on when the Court  
18 permitted the jury to see an exhibit.

19          THE COURT: Right. I understand that.

20          MR. CHAKRAVARTY: So you could daisy-chain.

21          THE COURT: So in other words, I want to --

22          MR. WEINREB: It's not either/or. It's not either the  
23 whiteboard or the Court system. Both can be active  
24 simultaneously.

25          MS. CLARKE: The whiteboard comes on after the Court

1 says, Yes, the exhibit is admitted.

2 MR. WEINREB: And even then the Court system stays on.  
3 So the whiteboard is just a monitor. The only thing is,  
4 instead of getting its signal from the output of the Court  
5 system --

6 THE COURT: So it would be going through both sources  
7 at the same time?

8 MR. WEINREB: So the computer that has the source  
9 material on it would have an output to the court system and an  
10 output to this monitor.

11 THE COURT: It would be a supplement; not a  
12 substitute?

13 MR. WEINREB: Yes.

14 MS. CLARKE: Can you just give the control to the  
15 judge and he could turn that monitor on?

16 MR. WEINREB: Unless it has a remote control, which it  
17 might have.

18 MS. PELLEGRINI: It would have a mouse. A mouse  
19 that's wireless. I don't know about -- that's for using it  
20 when you start making things come up and down on the monitor.  
21 But for actually turning it on, I don't know, actually, where  
22 that control is. I think it might be over where the other Phil  
23 in the clerk's office sits with the other materials.

24 MR. CHAKRAVARTY: The other -- just in order to give  
25 the IT people some options, the other potential is to

1 daisy-chain it to the other monitor so nothing would go on that  
2 screen.

3 MR. WEINREB: Then it wouldn't be digital. Once it  
4 goes through the court system, it is converted to analog. So  
5 it would be a supplementary system. There's an on/off switch  
6 on it, and barring any sophisticated way of using it, which is  
7 once an item is admitted into evidence the button could be  
8 pushed, and before that it would be off.

9 THE COURT: Now, it's not the immediate problem, but  
10 the admitted exhibit would then be part of the JERS system, and  
11 it would be analog then or digital? I think it's digital.

12 MR. CHAKRAVARTY: I think it's digital.

13 MS. CONRAD: Everything that -- I mean, I'm  
14 not -- this is irrelevant, but I'm not understanding how it's  
15 analog. I mean, if I've got a video in a digital format on my  
16 computer and I plug in the cable that connects it to the court  
17 system and play it, it's digital. It's playing in a digital  
18 format.

19 MR. WEINREB: It's getting converted to an  
20 analog -- whether the signal is digital or analog depends on  
21 the wire that is connected to the nest. The wire that connects  
22 your computer to the court system is capable of carrying a  
23 digital signal.

24 MR. CHAKRAVARTY: So if it was an HD regular VGA cable  
25 with the photo plugs, then it's downgrading --



1 MR. WEINREB: The red, white and yellow plugs, you  
2 know, so...

3 THE COURT: All right. Well, we'll look into it.

4 MR. WEINREB: I think, you know, as our final plug, it  
5 would really enhance the ability of the jury to see the  
6 evidence, if we have that option.

7 THE COURT: Okay.

8 MR. WEINREB: And the other issue we could wait till  
9 Tuesday. I just wanted to flag it in case it required any more  
10 discussion than that. The parties have agreed on an approach  
11 to doing social media checks of potential jurors, which  
12 coincides with the recent opinion of the -- I think it was  
13 the --

14 MR. CHAKRAVARTY: The bar counsel.

15 MR. WEINREB: -- bar counsel, which is that  
16 it's -- they decreed it was not unethical for parties to  
17 do -- look up information about potential jurors on social  
18 media as long as there was no contact made. So no friend  
19 requests, no -- no forms of access that leave behind --

20 THE COURT: Footprints.

21 MR. WEINREB: -- footprints. Precisely.

22 THE COURT: And you're agreed on that?

23 MS. CONRAD: Yes.

24 MS. CLARKE: We agreed on that. And the understanding  
25 is the government has access to other information about jurors

1     that they'll provide to us.  Whatever they search and find  
2     based on --

3             THE COURT:  Criminal record checks, you mean?

4             MS. CLARKE:  Yes.

5             MR. WEINREB:  It would just be a criminal record  
6     check.

7             THE COURT:  You're going to do that for everybody?

8             MR. WEINREB:  We are.

9             THE COURT:  And you'll share it?

10            MR. WEINREB:  We will.

11            THE COURT:  Just on that, you may know the answer to  
12     this, I don't know off the top of my head, is there an  
13     affirmative indication that civil rights have been restored for  
14     someone convicted in a crime?  Do you know, anybody?  I don't  
15     know if you tell simply by the passage of time.  I think it's  
16     seven years under the Massachusetts statute.  I don't know  
17     whether it's automatic.

18            MS. PELLEGRINI:  I thought it was still an open  
19     question.

20            THE COURT:  Maybe it is.

21            MR. WEINREB:  I don't believe it shows up in NCIC.

22            THE COURT:  You can't rely on the jurors to tell you  
23     reliably.  They won't know the answer, frankly.  Most of them  
24     won't.

25            MS. CONRAD:  I thought for felonies it was seven years

1 after release from prison, which makes it more complicated. I  
2 think the open question has to do with felon-in-possession  
3 cases, whether their right to carry a firearm has been  
4 restored. I think that was resolved by statute in 1998 in  
5 Massachusetts, that misdemeanor -- it's a long story. But  
6 misdemeanor -- defendants who committed Massachusetts  
7 misdemeanors never lost their civil rights, and then there was  
8 a question about -- I think it was Judge Saris' case,  
9 *Indelicato*, about whether by virtue of never having lost those  
10 rights they were said to be restored for purposes of a felon in  
11 possession statute.

12 That being said, I don't think that affects  
13 eligibility to serve on a jury. I think that's what you're  
14 thinking of.

15 THE COURT: All right. Well, we may all have to look  
16 into that.

17 MS. CONRAD: It's the felon in possession line of  
18 cases.

19 MS. PELLEGRINI: Could be.

20 THE COURT: It's not uncommon for a juror to have a  
21 ten- or 15-year-old felony conviction, and they don't know, and  
22 they could not tell us. Maybe the rare one would say, "I  
23 subsequently went down and, you know, got a firearms permit  
24 from the police chief," indicating restored rights, but other  
25 than that, they wouldn't know, really.

1 MS. CLARKE: Right.

2 THE COURT: Anyway -- so anyway, that exchange of  
3 information is fine. Of course, the two conditions are  
4 important: No contact, and that goes for the list too. No  
5 contact, obviously, with the jurors, just because the list is  
6 available with their home addresses. And no footprints, which  
7 I gather is technically feasible.

8 MR. WEINREB: Yes.

9 THE COURT: Okay.

10 MS. CLARKE: Happy new year. Oh, I'll see you before  
11 that. Merry Christmas.

12 THE COURT: We'll see you on Tuesday.

13 MS. CLARKE: Thank you, Judge.

14 THE COURT: Okay. Thank you, all.

15 (The proceedings adjourned at 11:28 a.m.)  
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## C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso  
MARCIA G. PATRISSE, RMR, CRR  
Official Court Reporter

Date: 5/10/16